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In the Supreme Court of the United States

OCTOBER TERM, 1989

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the Board reasonably concluded that certain strikers who had lost their status as "employee[s]" became "reemployed" within the meaning of Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), when petitioner, in a strike settlement, agreed to reinstate all of the strikers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 880 F.2d 1318 (Table). The decision and order of the National Labor Relations Board (Pet. App. 4a-6a), including the decision and recommended order of the administrative law judge (Pet. App. 7a-29a), is reported at 292 N.L.R.B. No. 84.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1989. A petition for rehearing was denied on July 25, 1989 (Pet. App. 3a). The petition for a writ of certiorari was filed on September 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(d)(1) of the National Labor Relations Act, 29 U.S.C. 158(d)(1), requires that a party intending to terminate an existing collective-bargaining agreement must furnish 60 days' notice of that intent to the other party to the agreement. Within 30 days after serving such notice, the party desiring termination must also notify the Federal Mediation and Conciliation Service, and the appropriate state mediation and conciliation agency, of the existence of the dispute, unless an agreement has been reached by that date (§ 8(d)(3)). In addition, Section 8(d)(4) prohibits a strike by a union seeking to change an existing agreement until 60 days after the union has given notice of termination. Finally, Section 8(d) provides that any employee who engages in a strike within any of these notice periods "shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections [8], [9] and [10] of [the Act], but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

2. Petitioner manufactures gaskets at a facility in Fairfield, Connecticut. The Fairfield Employees Association (the Union), a small unaffiliated association, has represented employees at petitioner's Fairfield plant since 1951. In January 1987, the Union notified petitioner of its intent to terminate the existing collective bargaining agreement, effective March 31, 1987.[1] During February and March, the parties negotiated for a new agreement, with Human Resources Manager Anthony Tecci acting as petitioner's principal spokesman. No agreement was reached, however, and on March 30, Union President Samuel Anzolletti informed Tecci that the Union would strike when the agreement expired on March 31. Pet. App. 8a; Gov't C.A. Br. 3-5.

[1] References hereafter are to 1987.

On Wednesday, April 1, all except three of the unit employees went on strike. Petitioner immediately notified the strikers that it would begin hiring permanent replacements on April 6. On the morning of April 2, Tecci placed telephone calls to various federal and state mediation agencies, asking whether the Union had filed the pre-strike notices required by Section 8(d)(3) of the Act. The agencies advised Tecci that there was no record of such notices, but they agreed to make a further search of the files. Thereafter, petitioner's top management discussed the possibility that if the strike were illegal, petitioner might have "the option to not rehire people that [it] felt might not be in the best interest of [petitioner's] long-term goals * * *." Pet. App. 9a; Gov't C.A. Br. 6-7.

That afternoon, after the strikers began receiving petitioner's warning letters, Anzolletti called Tecci and stated that he "felt it was in the best interest of all the employees and of the Company to get everybody back to work [and] to negotiate on a day to day basis" (Pet. App. 9a). Tecci said he would consult with his superiors. At a meeting later that day, Tecci told Anzolletti that petitioner was not interested in further negotiations; he stated, however, that if the Union accepted petitioner's last pre-strike proposal there would be no reprisals against any strikers.[2] Anzolletti replied that it would take time for him to reach his people, but that as a gesture of good faith he would remove the picket lines. Anzolletti removed the pickets that evening, and told them to return the following morning to discuss "a new proposal from the Company." *Id.* at 9a-11a.

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[2] Shortly after Tecci gave that message to Anzolletti, Tecci's superiors met with the plant supervisors and told them that the strike might be illegal. They asked the supervisors to consider which employees it would not be in petitioner's "best interest * * * to rehire," assuming petitioner was "not obligat[ed] to hire back any or all of the employees." Pet. App. 16a.

At about 7:30 the following morning (Friday, April 3), Anzolletti went to the plant and obtained Tecci's permission for the Union membership to meet on petitioner's property to vote on petitioner's new proposal. He asked Tecci whether, if the Union agreed to the proposal, the membership should go back to work that morning. Tecci replied that the strikers could return to work on Monday. Pet. App. 11a, 14a.

Anzolletti then presented petitioner's proposal to the membership. He explained that the proposal was exactly the same as petitioner's pre-strike offer, except that there would be no reprisals against any of the strikers. The membership then voted to accept the proposal and go back to work, and Anzolletti signed a handwritten note stating that "[t]he Fairfield Employees Association will ratify the proposed contract by management and will report Monday April 6th, 1987." Pet. App. 11a.

Before handing the note to Tecci, Anzolletti asked for and received Tecci's assurance that all of the strikers would be coming back to work. Tecci directed that all employees report on Monday, April 6, or on their next scheduled workday, and he again assured Anzolletti that all of the strikers would be reinstated. After receiving that assurance, Anzolletti handed Tecci the note accepting petitioner's contract proposal and ending the strike. Pet. App. 11a-13a.

Later Friday morning—following the meeting that ended the strike—petitioner's vice president met with plant supervisors to get a list of the former strikers whose retention might not be "in the best long-term interests" of the company. Pet. App. 17a. After Tecci finally confirmed, at about 10:00 or 10:30 a.m., that the required Section 8(d)(3) notices had not been filed, petitioner selected 15 former strikers whom it proposed to discharge. Pet. App. 17a, 23a-24a.[3]

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[3] Twelve of those selected were union officers or their relatives, or

At petitioner's request, Tecci then prepared, and delivered to Anzolletti, a letter informing the Union of the 15 discharges. *Id.* at 17a.

The letter came as a complete surprise to Anzolletti, who immediately contacted the Union's attorney. They jointly composed a letter for Anzolletti's signature, stating in part that "I agreed on all contract terms with you in the morning of April 3, 1987," and that "[a]t that time, we agreed that all employees would be brought back." Pet. App. 19a. Anzolletti handed the letter to Tecci at the Monday morning meeting at which they initialed certain agreed-upon changes in the collective-bargaining agreement. The next day, Tecci wrote back to Anzolletti, denying that he had ever made any promises to reinstate the strikers. *Id.* at 19a-20a.

3. Adopting the findings and conclusions of the administrative law judge, the Board found that petitioner had engaged in bad faith bargaining and had violated Section 8(a)(5) and (1) of the Act by reneging on its agreement to reinstate all the strikers. Pet. App. 4a-29a. The Board agreed that the strike was conducted in violation of Section 8(d), and that, while the strike continued, "each of the strikers lost 'his status as an employee of the employer' as mandated by Section 8(d)" (Pet. App. 22a). As a result, the Board continued, petitioner was entitled during such time "to discharge any of the strikers it chose" (*ibid.*). The Board found, however, that petitioner had elected instead to negotiate a settlement of the strike by agreeing to reinstate all of the striking employees if, in turn, the Union accepted petitioner's last contract offer. By so agreeing, the Board concluded, petitioner had "reemployed" the strikers within the meaning of Section 8(d), and was no longer entitled to

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had participated in prior Board or grievance proceedings. Many were long term employees with good employment records. Pet. App. 23a-24a.

discharge them on whatever basis it chose. Pet. App. 14a-15a, 22a. The Board agreed with the General Counsel that the " 'statute does not require that employees "return to work" . . . to regain employee status' " (*id.* at 20a). It therefore concluded that "when the full strike settlement agreement was reached and [petitioner had] rescheduled the employees to return to work, the strike ended and the strikers were 'reemployed' within the meaning of [Section 8(d)]" (*id.* at 22a).

Having determined that all the strikers had been "reemployed"—thus regaining their status as statutory employees—the Board found that petitioner had engaged in bad faith bargaining by reneging on its promise to reinstate them all (Pet. App. 22a). The Board further found that petitioner had discriminatorily discharged 12 of the 15 employees based on their union affiliation or protected concerted activity (*id.* at 23a-25a). It directed petitioner to offer to reinstate and make whole all 15 of the affected employees (*id.* at 27a).[4]

4. The court of appeals enforced the Board's order in an unpublished decision (Pet. App. 1a-2a). The court held that the Board's ruling—that illegal strikers are "reemployed" for purposes of Section 8(d) when an employer agrees to reinstate them—"is a reasonable construction of the Act," and was therefore "entitled to deference" (Pet. App. 2a). The court also held that substantial record evidence supported the Board's finding that petitioner had agreed to reemploy the 15 striking workers. The court therefore held that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to reinstate the strikers pursuant to its agreement with the Union (*ibid.*).[5]

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[4] The Board also found that petitioner had coercively interrogated one employee, and had coerced a second employee in the exercise of his rights under Section 7. Pet. App. 5a, 25a-26a.

[5] The court also held that there was substantial evidence to support the Board's findings that petitioner had coerced two of its employees (Pet. App. 2a). The petition does not present that issue (Pet. 3 n.3).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Under Section 8(d) of the Act, a party that desires to terminate or modify a collective-bargaining agreement must notify federal and state mediation services within 30 days after giving similar notice to the other party to the agreement. Section 8(d) further provides that an employee who goes on strike within the prescribed notice period "shall lose his status as an employee of the employer engaged in the particular labor dispute" for purposes of the Act. The Act states, however, that "such loss of status for such employee shall terminate if and when he is reemployed by such employer."

In the present case, the Board held that petitioner "reemployed" the strikers when it agreed, in a strike settlement, to reinstate all of them in return for the Union's promise to accept petitioner's last contract offer. The Union kept its part of the bargain, by accepting the final pre-strike offer and terminating the picketing. Petitioner contends (Pet. 7-8), however, that a striker is not "reemployed" until he has actually returned to work. Accordingly, petitioner reasons, the company was free to discharge 15 of the strikers—even on an otherwise discriminatory basis—since the strikers had not yet returned to work, and had therefore not yet been "reemployed."

The statute does not define the term "reemployed." As the court below concluded (Pet. App. 2a), the Board's interpretation of that term—according to which a striker is "reemployed" once the employer evidences an intent to resume a normal employer-employee relationship—is reasonable and thus entitled to deference. See *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S.

112, 123-124 (1987). Petitioner challenges that construction, contending (Pet. 8-12) that the Board's interpretation encourages unions to coerce employers to reinstate unlawful strikers. Whatever merit that contention may have in other contexts, no claim of coercion can be made on this record.[6] To the contrary, the record shows that petitioner maintained the upper hand throughout the dispute. Prompted by petitioner's warning that it would start hiring permanent replacements, the strikers, through their union representative, offered to return to work almost immediately, without a contract. The strikers also agreed to remove the picket line, as a gesture of good faith. Pet. App. 9a. Moreover, there is no evidence to suggest that petitioner offered to reinstate the strikers only because it was "coerced" into doing so.

2. Petitioner contends (Pet. 8-10) that the decision below conflicts with the D.C. Circuit's decision in *United Furniture Workers* v. *NLRB*, 336 F.2d 738, cert. denied, 379 U.S. 838 (1964). There is no merit to that claim. In *United Furniture*, the court of appeals sustained an employer's decision to fire certain employees who had engaged in a strike without having furnished the required Section 8(d)(3) notices. But in that case, the unlawful strike was still in progress when the strikers were discharged. Moreover, there was no showing in *United Furniture* that the employer had agreed, prior to the discharge, to reinstate the strikers.[7] In the present case, by contrast, petitioner fired all 15 strikers

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[6] Moreover, it is difficult to see how "coercion" – whatever that term means in this setting – is more likely to occur if the term "reemployed" is interpreted to include not only return to work but also an agreement to reinstate.

[7] Indeed, at a negotiating session held with a federal mediator the day before the strikers were discharged, "the Company made plain, with the Union's acquiescence, that its participation in that meeting was with a full reservation of whatever rights accrued to it by reason of the Union's failure to give the Section 8(d)(3) notices." 336 F.2d at 740 n.2.

after the strike was settled, and in derogation of its agreement to reinstate them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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